

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**KEPHART TRUCKING COMPANY, INC.**

**and**

**Case Nos. 22-CA-29531  
22-CA-29733**

**TEAMSTERS LOCAL NO. 125, IBT**

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for the Acting General Counsel  
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Party

**DECISION**

**Statement of the Case**

LAUREN ESPOSITO, Administrative Law Judge. Based upon charges filed on July 13, 2010 and December 7, 2010, a First Amended Consolidated Complaint and Notice of Hearing (the “complaint”) issued on February 8, 2011 alleging that Kephart Trucking Company, Inc. (“Employer” or “Respondent”) violated Sections 8(a)(1) and (3) of the Act by discharging Kathleen Falzarano in retaliation for her support for and activities on behalf of Teamsters Local No. 125, IBT (the “Union”). The complaint further alleges that Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances, promising employees higher wages and improved terms and conditions of employment if they abandoned their support for the Union, informing employees that uniforms could not be provided because of the Union, and interrogating employees regarding their union sympathies. Respondent filed an answer denying the material allegations of the complaint. This case was tried before me on February 23 and 24, 2011, and on March 21, 2011, in Newark, New Jersey.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the “General Counsel”) and Respondent, I make the following

## Findings of Fact

## I. Jurisdiction

Respondent is a Pennsylvania corporation engaged in the interstate transportation and freight management of solid waste. Respondent operates four facilities in New York, New Jersey, and Pennsylvania. Its overall operations are coordinated through its facility and offices in Bigler, Pennsylvania, and the other facilities at issue in this case are located at 23 Second Street, Kearney, New Jersey, and at 56 Route 46, Delaware, New Jersey. Annually, Respondent in the course and conduct of its business operations purchased and received at its Delaware, New Jersey facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

## A. Background

Timothy and David Kephart are Respondent's co-owners. Timothy Kephart is responsible for the operational aspects of the business, customer service, sales and marketing, and safety and compliance issues. David is responsible for overseeing maintenance and hardware of the company's vehicles and equipment, and driver recruitment. The parties stipulated, and I find, that Timothy and David Kephart are supervisors of Respondent within the meaning of Section 2(11) of the Act. David Keith is the company's operations manager. Pat Kane works in safety and compliance as a log analyst, reviewing drivers' logs on a daily basis, performing field inspections on drivers and equipment, and monitoring compliance with Department of Transportation ("DOT") regulations as they pertain to the drivers' work. Keith and Kane work at the Bigler facility.

Thomas Nicole is the terminal manager at Respondent's Delaware, New Jersey facility, and is responsible for the facility's overall day-to-day operations. The parties stipulated, and I find, that Thomas Nicole is a supervisor within the meaning of Section 2(11) of the Act. Nicole's assistant is Nicole Morrissey, who, according to Nicole, performs dispatching functions with him, and could be considered a "driver manager" at the Delaware facility. John Evans is the terminal manager at the Kearney facility, and Zane Barenzeco was the driver manager there until some time in May 2010.

Approximately fifty drivers work out of the Kearney facility. Thirty drivers work out of the Delaware facility, and sixty work out of the facility in Bigler. The drivers' terms and conditions of employment, and company policies affecting their work, are established from the Bigler facility. Hiring, firing, and disciplinary determinations are made at the Bigler facility as well.

## B. The organizing campaign at the Kearney facility, and the employer's response

In the spring of 2010, the Union filed a petition in Case No. 22-RC-13102 for a representation election in a bargaining unit of drivers working out of the Kearney facility. A

hearing took place on May 5, 2010,<sup>1</sup> and on June 2 the Region Director, Region 22, issued a Decision and Direction of Election.<sup>2</sup> An election was conducted on July 1, and the Union prevailed.

Respondent retained the Labor Relations Institute a few weeks after the Union filed its petition in order to provide advice and assistance in convincing the employees at the Kearney facility to vote against Union representation. Consultants David Acosta and Eric Funston of the Institute met with employees at the Kearney facility on several occasions in May or June. The parties stipulated, and I find, that Acosta and Funston were agents of Respondent within the meaning of Section 2(13) of the Act. Timothy Kephart testified that these meetings were conducted in part in order to obtain information from the employees regarding their issues and concerns.

Brian Cole, Esau Valencia, and Robert Massaline, all drivers currently working out of the Kearney facility, testified regarding meetings they attended with Acosta or Funston and several other drivers, which occurred in a trailer at the Kearney facility prior to the election.<sup>3</sup> Cole and Valencia testified that the consultant at these meetings showed the employees a video critical of unions. Cole testified that the consultant then asked the employees for a list of their complaints, and the employees mentioned pay, hours of work, equipment, and the number of loads the company expected the drivers to haul. Cole himself complained that the company had verbally reprimanded him when he declined to come in to work because he was approaching the limit on his total weekly work hours established by DOT regulations. The consultant told the employees that they had legitimate complaints which he would discuss with the Kepharts. The consultant then stated that usually when he related employee concerns to management, some manager might be discharged. He proceeded to ask Cole whether Cole had experienced any problems with Zane Barenzeco and another employee.<sup>4</sup> However, the consultant's comments in this regard were speculative, and not a definite promise.

Valencia testified that he attended a meeting with a labor consultant and three other employees. After the video, the consultant asked the employees whether they had complaints about the company, and Valencia stated that the employees needed uniforms, that there were ongoing safety concerns with broken equipment which was not promptly repaired, and that the wages and benefits were inadequate. According to Valencia, the consultant stated that the uniforms were on their way, but were on hold because the Union was involved.<sup>5</sup> The consultant also stated that, based on a conversation with Timothy Kephart, the employees would receive a "bump up" in pay if they did not vote for the Union.

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<sup>1</sup> All subsequent dates are in 2010 unless otherwise indicated.

<sup>2</sup> Respondent contended at the representation proceeding that the appropriate bargaining unit consisted of all drivers employed out of its Kearney, Delaware, Bigler, and Queens, New York facilities, but the Regional Director found the evidence insufficient to overcome the presumption that a single location unit was appropriate.

<sup>3</sup> Neither Acosta nor Funston testified at the hearing.

<sup>4</sup> Barenzeco was discharged by the company in May, ostensibly after this meeting took place.

<sup>5</sup> Valencia noted that at the time of this meeting he had seen the Delaware drivers wearing company uniforms when he encountered them at the Tullytown landfill.

Massaline testified that he attended a meeting with a labor consultant and about five other employees. Massaline stated that the consultant told the employees that the Kepharts were aware that there were problems with the wages and medical benefits. The consultant asked the employees to give the Kepharts a chance, and if they did not fix these problems the employees could vote in another union election after a year.

Cole, Valencia, and Massaline also testified regarding meetings held by the consultants with the Kepharts present during the days before the election. These meetings also involved small groups of employees. Cole testified that the meeting began with the consultant's stating that the Kepharts wanted to express their concerns and opinions, and asking the employees whether they had any questions. Cole asked whether the company would change its current policy of employment-at-will if the Union lost the election, and the consultant responded that the Kepharts could not answer that question. Timothy Kephart then stated that he had not been aware of the employees' concerns, and that if the employees did not vote for the union they would probably see some changes. Kephart also said several times that if the employees didn't vote for the union it would give him the opportunity to make changes. During the meeting, another driver asked about uniforms, and David Kephart stated that the facility had received the uniforms, but could not distribute them to the employees because of the Union. David also said that the company could not promise the employees additional compensation because of the Union.

Valencia testified that the meeting he attended with the Kepharts began with the consultant's stating that he had informed the Kepharts of the employees' complaints. Timothy Kephart then told the employees that the uniforms were on this way but were "held up" because of the Union's involvement. Timothy also stated that if the employees didn't vote for the Union, they would receive higher pay. Massaline testified that at the meeting he attended David Kephart echoed the labor consultant's comments regarding the wages and medical benefits, and stated that if the union won the election, "everything is off the table."

Timothy Kephart testified at the hearing, but was not questioned regarding the meetings with employees prior to the election. David Kephart testified that employees stated at the meetings that they wanted new uniforms, and that either he or Timothy told the employees that the company had suspended the process of obtaining new uniforms during the Union's organizing campaign to avoid potential allegations of interfering with the election process. David testified that during the meetings, the Kepharts sought to determine the employees' concerns and issues, even though they could not be addressed directly at the time.

#### C. The work of respondents' drivers and applicable DOT regulations

The drivers at Respondents' Kearney and Delaware facilities haul trash from transfer stations in Mount Olive and Parsippany, New Jersey, to a landfill in Tullytown, Pennsylvania, all of which are operated by Waste Management. Although Tullytown is equidistant from the Mount Olive and Parsippany transfer stations, the drive from the Mount Olive station is longer because the route involves local roads with streetlights and slower traffic. The Parsippany station opens earlier than the Mount Olive station, so drivers typically obtain their first load of the day at Parsippany if they did not pick up a load the day before (referred to as "pre-load" or "half load").

When a driver arrives at the Tullytown landfill, they stop first at a scale that weighs the waste their truck is carrying, and receive from the landfill personnel a landfill ticket or delivery manifest recording their arrival time and the tonnage their truck contains. From the scale, the driver proceeds to the "tipper," where the driver removes the tarp from the top of their trailer.

The trailer is detached from the truck and placed on the tipper, which dumps the waste contained in the trailer. The trailer is then cleaned and reattached to the truck. The drivers then return to the scale, where their time of departure is recorded on the landfill ticket. Respondent is paid by Waste Management based upon the weight of the loads reflected on the landfill tickets issued to the drivers. Timothy Kephart testified that payment is not affected by the time a driver enters or leaves the landfill (as reflected on the ticket).

The work of Respondents' drivers is subject to regulations promulgated and enforced by the Department of Transportation's Federal Motor Carrier Safety Administration. These regulations restrict drivers to eleven hours of driving during any one consecutive fourteen hour period, and to seventy hours of work during any eight consecutive days. Under the regulations, the fourteen hour period begins when the driver begins performing any sort of work, not only driving. Off-duty time does not extend the fourteen hour period, but it is also not included in the seventy-hour weekly work maximum.

Drivers are required to maintain logs which record the specific times and the overall amount of time spent "off-duty," "on-duty not driving," and "driving" during each day. At the Delaware facility, drivers submit all of their paperwork, including their driver logs and landfill tickets, to Nicole every day at the end of their shifts. Nicole then inputs their total hours for the day into the company's computer, which keeps a running total of each driver's weekly hours. The computer system provides color-coded totals of driver hours, as well as "alerts" when a particular driver is approaching the seventy hour weekly limit. Nicole also reviews driver logs to see how long a period of time drivers spend in the landfill.

Nicole testified that he questions a driver about the veracity of their logs when he discovers a "red flag," but that he would more likely discuss the issue with Pat Kane at Bigler. Kane performs audits of driver logs by checking the times entered in the driver logs against GPS records, landfill tickets, and E-Z Pass records. Kane generates written driver ratings based upon his audits, and Nicole receives copies. If Kane discovers a violation of the hours of service requirements, he contacts Nicole, who testified that he would discuss the problem with the particular driver and tell them that "they need to keep a better eye on what it is they're doing." Nicole also informs the driver that they might be subject to additional discipline if they continue violating the hours of service requirements.

On June 4, Nicole posted a notice to the drivers at the Delaware facility stating as follows:

So everyone knows I am getting questions about log time and such based on the GPS units that are in the trucks. We (Kephart Trucking) have the ability to look at the history of your trucks any time we want. I just got a call and was asked about a specific driver and was told what the times should have been entered on his logs [sic].

One thing to please keep in mind is that through the GPS the DOT is able to question logs books based on the findings of the GPS. There are a lot of new regulations coming into play here over the next several months that could cause tickets to be written directly to you drivers.

Right now they are asking about start and ending times and making sure there is a 10 hour off duty reset before restarting.

I was told to shut a driver down that would have been able to legally log a 3<sup>rd</sup> load on the ground because he did not have a 10 hour reset. Please keep and [sic] eye on all details so we don't run into a problem and I don't have to shut anyone down.

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G.C. Ex. 5.

Respondent maintains a driver policy manual which describes the drivers' terms and conditions of employment, and discusses safety and compliance issues, operations, and recordkeeping and reporting. The driver policy manual also discusses discipline and discharge which may be imposed for various violations of company rules and policies. The driver policy manual states that employees will receive "reprimands" for violation of the DOT hours and work limitations, and for falsification of log books, including "Log falsification, logs do not match weigh tickets." The driver policy manual also establishes a policy of progressive discipline for recurring "violation of hours of service and log falsification" violations within the same six month period, involving reprimands and reviews of the violation (first violation), meetings with Respondent's Safety Director (second violation), education classes (third violation), and potential disqualification in the event of a fourth reprimand within six months. By contrast, the safety and compliance section of the driver policy manual explicitly states that unauthorized passengers in company vehicles "could result in termination," and that preventable accidents "will be probable cause for termination."

D. The employment and discharge of Kathleen Falzarano

25 Kathleen Falzarano began working as a driver for Respondent in June 2010. Prior to her employment with Respondent, Falzarano had been a truck driver for 15 years, working for Gary Grey Trucking for several weeks in 2007,<sup>6</sup> and various other companies. She had previously been a union member.

30 On June 9, Falzarano attended a new employee orientation for six to seven hours, in a trailer at the Kearney facility, which was conducted by a woman named Tammy. Falzarano testified that completing driver logs was briefly discussed, and she filled out a sample log. Falzarano stated that she did not complete the log correctly because she had not had to complete driver logs for a job since 1997, but her errors were not corrected. Falzarano testified  
35 that David Kephart came into the orientation briefly. Falzarano testified that she asked him whether she could record "off duty" and "not driving" during the time that she was in the landfill, and he responded that he was not certain. Although the company's ability to confirm the whereabouts of drivers by GPS was mentioned, no one discussed DOT regulations, fines for filling out logs incorrectly, or company and DOT audits of driver logs. A copy of the driver policy  
40 manual discussed above was distributed.

After the orientation concluded, Falzarano drove to the Delaware facility, where she picked up a Nextel and other equipment from Thomas Nicole. Falzarano testified that she asked Nicole whether the pay would be \$80 per load, as it had been at Gary Grey, and Nicole  
45 said that was correct. According to Falzarano, Nicole said that the drivers were required to haul three loads of waste per day. Falzarano asked, "What about the log books?" Nicole responded that she should not worry about the log books and the GPS, because he made special

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50 <sup>6</sup> Gary Grey had previously owned the Delaware facility now operated by Kephart, and Nicole was a manager and dispatcher for the facility when Gary Grey owned it as well.

allowances for the Delaware drivers that he did not discuss with the office at Bigler. Falzarano testified the Morrissey was present during this conversation. Nicole remembers speaking to Falzarano immediately after her orientation, but could not recall the substance of their conversation.

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Falzarano testified that a probationary period for new employees was not discussed during her orientation or by Nicole, and Respondent's driver policy manual does not mention any probationary period. Nicole testified that he considered the first thirty days of a new driver's employment to be a learning period, and was typically more lenient with employees during this time, particularly with regard to their lack of knowledge and slower work pace.

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Falzarano began driving for Kephart on June 15, and for the first day and a half she followed driver Larry Simpson. Nicole testified that he assigned Falzarano to follow Simpson because he was a good, experienced driver whose paperwork always seemed to be in order. Falzarano testified that on her first day following Simpson she asked him how long a period of time he recorded in his log for the trip from Delaware to the Tullytown landfill. Simpson replied that "you have to log at least an hour and a half," but that he only logged 15 minutes for pre-trip work and fueling up. Simpson also told Falzarano that time in the landfill could be logged as "off duty – no driving" in order to conserve driving hours.

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Subsequently, Falzarano would begin her day with a truck at the Delaware facility which had been loaded the night before. She would drive to the Tullytown landfill, dump the load, proceed to the Mt. Olive transfer station to pick up another load, and drive back to the Tullytown landfill to dump that load. She would then drive from Tullytown to the Parsippany transfer station to pick up another load. Finally, she would return the truck with that load to the Delaware facility, where she left it to begin the next day of work. She completed logs on a daily basis, which she submitted at the office trailer at the Delaware facility along with the day's landfill tickets, driver's inspection, and a form describing the routes taken during the day.

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On June 21, Falzarano's truck broke down after overheating in the Tullytown landfill, and she returned to the Delaware facility to obtain a new truck. Falzarano testified that while at the Delaware facility she spoke to Nicole, who stated that he was going to "start to weed out the lazy drivers" who come in at 7 a.m. and only haul two loads per day, and keep the drivers that do three loads per day. Falzarano testified that Morrissey was present during this conversation. Nicole testified that he encouraged drivers to do as many loads as possible, but could not recall having this discussion with Falzarano.

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Falzarano testified that at several points during a typical work day she spoke to other drivers. This occurred in the coffee shop right outside of the Tullytown landfill, and in the landfill while removing the tarp from the top of the trailer on the line for the tipper. She also communicated with Nicole, Morrissey, and other drivers on her two-way radio. Falzarano stated that the Kephart Trucking drivers she saw from the Kearney facility were always talking about the Union. When she heard these drivers stating that the Union would take their money in dues so that they wouldn't have a paycheck left and that they would lose their jobs, she told them that she had been in a union. She told them that being in the union was "great" because she had a good pension and didn't have to work eighty to one hundred hours a week to make money. Falzarano told them that they shouldn't have to work for \$8.00 per hour, that they should be able to work a 40 hour week, get overtime, and "be treated like humans."

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Falzarano also discussed the Union with a Kephart Trucking driver named Joe Armahizer on multiple occasions, beginning when Falzarano called him during the second week of work and asked what was going on with the Union at Kearney. Armahizer also worked out of

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the Delaware facility. During their conversations, Armahizer said that the Union was bad because it would steal the employees' money and the drivers would lose their jobs after the company moved its trucks to a different facility. Falzarano testified that eventually she and Armahizer discussed the Union on a daily basis. On the day of the election at the Kearney facility, Armahizer called Falzarano repeatedly, telling her that the Delaware drivers needed to have a meeting that weekend to keep the Union out, because the Union had won the election at Kearney. Armahizer eventually told Falzarano that she needed to sign a piece of paper to keep the Union out, and Falzarano refused. She also refused to attend the meeting that Armahizer proposed.<sup>7</sup> According to Falzarano, during these conversations Armahizer became personally insulting as she repeatedly declined to sign anything opposing the union, or attend the meeting to keep the Union out of the Delaware facility.

On July 5, while handing in paperwork at the Delaware facility, Falzarano went to the office trailer to complain to Nicole about Armhizer. Falzarano testified that she entered the trailer and began to tell Nicole about the argument with Armhizer, when Nicole told her to come in and sit down.<sup>8</sup> Nicole asked Falzarano what she thought of the Union, and Falzarano responded that she thought the Union was great, because when she was represented by a union she had a great pension and annuity, great medical benefits, and a great pay rate. Nicole told Falzarano that he was a driver at Mount Hope Trucking, and he did not like the union there. Nicole stated that he used a special green pen to mark his ballot in the Mount Hope Trucking representation election, so that he could show the other drivers when things went bad that it was not his fault. Falzarano testified that Nicole said that he was concerned about losing his job the way the Gary Grey drivers did when Kephart Trucking bought the Delaware facility. Nicole told Falzarano that it would be easier for Timothy Kephart to fly his airplane closer to Kearney, and that if the Union came in everyone would lose their jobs.

Nicole testified that he had at least one conversation with Falzarano after the election at the Kearney facility. Nicole stated that Falzarano did not disclose her opinion of unions, but that at some point during the conversation Falzarano stated that she was a member of the union. According to Nicole, he responded that he had had a bad experience with a union while employed at a Holiday Inn. Nicole testified that he believed that the fact that he had a withdrawal card from the Union after working at Mount Hope Trucking came up during the conversation, but he did not recall discussing Mount Hope Trucking. Nicole also testified that Falzarano told him that she did not intend to go to the meeting of the Delaware drivers that Armahizer was arranging, because she was going to the beach.

The next day, July 6, after Falzarano picked up her third load from Parsippany, she called Morrissey and told her that she intended to take the load to the Tullytown landfill. Falzarano's log for the day reflects that she hauled a third load from Parsippany to Tullytown, although GPS records indicate that she returned to the Delaware facility several hours after the time indicated on her log.

Nicole testified that prior to 7 a.m. on the morning of July 7, he reviewed Falzarano's paperwork from the previous day, and found it suspicious. Checking Falzarano's log against the landfill tickets to attempt to verify the times recorded in the log, he discovered that the times on

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<sup>7</sup> Nicole testified that after the election, Armahizer and five to six other drivers met with the Timothy and Dave Kephart, and that as a result a bonus system was instituted to award drivers an extra \$50 for every load hauled in excess of ten per week.

<sup>8</sup> Nicole acknowledged during his testimony that Armahizer was quite a talkative individual.



the landfill tickets had been altered. He called Falzarano, who was on her way to the Tullytown landfill with a load she had picked up in Parsippany, and asked her to return to the Delaware facility. Nicole then called Kane, told him that Falzarano's log for July 6 did not make sense, and asked what her logs had been like in the past. Nicole testified that Kane immediately

responded, without looking at any GPS or other records, that Falzarano had had some

problems with starting times that did not appear to be accurate because they indicated that she left the Delaware facility before the truck that she used was returned by the driver using it on the night shift. Nicole testified that he did not speak with either of the Kepharts before meeting with Falzarano.

When Falzarano returned to the Delaware facility she met with Nicole, with Morrissey present. Nicole had Falzarano's logs and landfill tickets with him, and told Falzarano that "a red flag had gone up" when he saw the GPS and the log book and the landfill tickets, and that he was going to discharge her for falsifying logs. Falzarano asked whether that meant that she was fired, and Nicole said yes. Falzarano said that she had done the same thing in the past, and asked whether they could "just fix it." Nicole responded that the company did not know whether it would get paid for the loads Falzarano had hauled on July 6. Falzarano asked to be permitted to return to her truck and finish her paperwork, so that she would get paid. In his testimony, Nicole in essence confirmed Falzarano's account of their conversation. He testified that Falzarano stated that she had falsified the logs and landfill tickets because it was necessary in order to deliver three loads a day, and that he countered that other employees were able to do so without falsifying the documents. Nicole also denied telling Falzarano that he had seen her GPS records.

### III. Analysis and Conclusions

A. Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances, promising employees benefits if they abandoned their support for the Union, and informing employees that new uniforms were not being distributed because of the Union

#### 1. Credibility issues

I credit the testimony of Brian Cole, Esau Valencia, and Robert Massaline regarding the statements made by David Acosta, Eric Funston, and the Kepharts at the Kearney meetings prior to the representation election. As current employees, their testimony may be considered particularly reliable in that it is potentially adverse to their own pecuniary interests, as the Board has noted. *Covanta Bristol, Inc.*, 356 NLRB No. 46 at p. 8 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995).

In addition, the testimony of the employees is in large part uncontradicted. Acosta and Funston did not testify, and no other witness addressed their statements at the meetings that Cole, Valencia, and Massaline described. Although Timothy Kephart testified at the hearing, he was not questioned regarding his meetings with employees, and did not address them, justifying an adverse inference with respect to the issue. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063, n. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640, n. 15 (1995).

I also credit Valencia and Cole's accounts of the Kepharts' statements regarding new employee uniforms to the extent that they conflict with David Kephart's testimony. Valencia and Cole both testified that during the meetings Timothy and David attended, the Kepharts told the assembled employees that uniforms could not be distributed or were "held up" because of the Union. In his testimony regarding the two meetings he attended, David Kephart admitted that either he or Timothy told the employees that the company had suspended the process of

obtaining new uniforms during the organizing campaign, but also claimed that he or Timothy stated that the uniforms were being delayed so that the company would not face allegations that it was improperly interfering in the election process.

I credit Valencia and Cole's testimony in this regard. In addition to their status as current employees whose testimony is considered particularly reliable, their accounts of the meetings were more detailed and credible than David Kephart's vaguer contention that either he or Timothy informed the employees that the process of obtaining new uniforms had been suspended to avoid allegations that the company was interfering with the election process. In addition, David Kephart's other testimony regarding the labor consultants and the employee meetings was less than credible. His contentions that the labor consultants were not hired to convince the Kearney employees to vote against the Union, and that the meetings were not conducted for that purpose as well, were inherently implausible, and contradicted Timothy Kephart's testimony that the company opposed the Kearney organizing campaign.

For all of the foregoing reasons, I credit the testimony of Cole, Valencia, and Massaline regarding the events of the meetings prior to the election at the Kearney facility.

2. Respondent unlawfully solicited employee grievances and promised higher wages and other improved terms and conditions of employment if employees abandoned their support for the Union

The evidence establishes that Respondent violated Section 8(a)(1) by soliciting employee grievances and promising improved terms and conditions of employment at the Kearney meetings prior to the election. Section 8(a)(1) prohibits the solicitation of employee grievances in a manner which interferes with the exercise of Section 7 rights. While the solicitation of grievances is not unlawful in and of itself, it "raises an inference that the employer is promising to remedy" them. *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p. 19 (2010), *quoting Amptech, Inc.*, 342 NLRB 1131, 1137 (2004). It is well-settled that when the evidence does not establish a previous history of grievance meetings, conducting meetings where employees are encouraged to discuss grievances is unlawful when the employer also makes express or implied promises to remedy them. *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p. 19; *Evergreen America Corp.*, 348 NLRB 178, 215 (2006).

I find based on the testimony of Cole, Valencia, and Massaline that Respondent unlawfully solicited grievances and promised higher wages and other improved terms and conditions of employment if the employees voted against the Union. First of all, there is no evidence in the record that Respondent had any history of conducting meetings with employees in order to solicit grievances regarding their terms and conditions of employment. In addition, it is undisputed that, as David Kephart testified, the Kearney meetings were conducted in order to obtain information regarding the employees' issues and concerns pertaining to their employment, or in other words, to solicit grievances.

The testimony of Cole, Valencia, and Massaline establishes that the labor consultants explicitly solicited employee grievances, and that both the consultants and the Kepharts implicitly or explicitly promised benefits to the employees. For example, Cole testified that after soliciting the employees' concerns, the consultant told them that they had "legitimate complaints" which he would discuss with the Kepharts, and that typically after management becomes aware of specific employee dissatisfactions, a manager may be discharged. Valencia testified that the consultant told the employees that he had discussed their complaints regarding wage rates with Timothy Kephart, and that the employees would receive increased pay if they voted against the Union. Massaline testified that the consultant said that the Kepharts were

aware of the wage and benefit issues raised by the employees, and that if the Kepharts did not remedy the problems the employees could vote in another election after a year. I find that these statements on the part of labor consultants Acosta and Funston constituted unlawful solicitation of grievances and promises of benefit. *Manorcare Health Services-Easton*, 356 NLRB No. 39 at p. 20 (company representatives unlawfully promised benefits by telling employees they would “try to fix [problems] without a second party involved” after soliciting grievances); *Evergreen America Corp.*, 348 NLRB at 217 (exhortations to “give the company another chance” and that employees who remained unsatisfied could “vote for the union next year” following solicitation of grievances unlawful).

The evidence establishes that the statements of the Kepharts themselves at the meetings they attended with the labor consultants also violated Section 8(a)(1), for the same reasons. Cole, Valencia, and Massaline testified that these meetings began with the consultant’s either soliciting grievances again from the employees or stating that the Kepharts were aware of the complaints that the employees had previously raised. At the meeting Valencia attended, Timothy also told the employees that if they did not vote for the Union they would receive higher pay, a straightforward promise of benefit that violated Section 8(a)(1).

The Kephart’s statements at the meetings attended by Cole and Massaline were couched in somewhat more equivocal terms. At the meeting that Cole attended, Timothy Kephart followed the consultant’s remarks by stating that if the employees didn’t vote for the Union he would have the opportunity to make changes, and would probably do so. At the meeting with Massaline and other employees, David Kephart reiterated the consultant’s statement that the employees should give the company a chance to fix the problems with wages and medical benefits. David stated, however, that if the Union won the election, “everything is off the table.” The Board has held that vague exhortations on the employer’s part for the employees to “give us a second chance” are within the limits of permissible campaign propaganda. *Noah’s New York Bagels*, 324 NLRB 266, 267 (1997). However, where, as here, such statements are made in the context of unprecedented meetings soliciting grievances, and address the specific problems employees have previously raised, they are unlawful. *Evergreen America Corp.*, 348 NLRB at 215-217 (2006); *Noah’s New York Bagels*, 324 NLRB at 271. I therefore find that these statements constituted unlawful promises of benefit if the employees abandoned their support for the Union.

### 3. Respondent unlawfully informed employees that new uniforms would not be distributed because of the Union

I find that Respondent violated Section 8(a)(1) by informing employees that new uniforms were not being obtained or distributed because of the Union. In general, an employer must provide expected wage or benefit adjustments “as if the union were not on the scene,” unless it makes clear to the employees that the adjustment would take place regardless of whether they select a union, and that the only reason for postponing it is “to avoid the appearance of influencing the election’s outcome.” *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001), quoting *KMST-TV, Channel 46*, 302 NLRB 381, 382 (1991). In discussing a postponement with employees, the employer must use language which does not attribute to the union the “blame” or “onus” for its delay in providing the expected benefits. *Grouse Mountain Lodge*, 333 NLRB at 1324; *Atlantic Forest Products*, 282 NLRB 855, 858 (1987).

Based upon the testimony of Cole and Valencia, I find that the labor consultants, and Timothy and David Kephart, unlawfully informed employees that the new employee uniforms they requested were not being provided because of the Union. Valencia testified that during the meeting he attended with the labor consultant, the consultant stated in response to employee

questions that uniforms were coming, but were “on hold” because of the Union’s involvement. There is no evidence that this statement was qualified in any way to remove the onus for postponing the acquisition of uniforms from the Union. *See Grouse Mountain Lodge*, 333 NLRB at 1324; *Atlantic Forest Products*, 282 NLRB at 857-858. As a result, the labor consultant’s statements in this regard were unlawful.

Even assuming that one of the Kepharts did in fact add the statement that the new uniforms were being delayed solely to avoid the appearance of influencing the employees’ vote, I would still find a violation. The credited testimony of the employees establishes that the Kepharts and the consultants simultaneously made other statements explicitly attributing the delay to the Union, and there was no effort made to impress upon the employees that after the election the uniforms would be provided regardless of the outcome. *Compare Sam’s Club*, 349 NLRB 1007, 1008-1009 (2007) (company permissibly informed employees that merit increases were delayed solely to avoid impression of election interference and would be granted after election regardless of outcome), *SNE Enterprises*, 347 NLRB 472, 477-478 (2006) (employer notices attributing delay in regular wage increase to a desire to avoid unfair labor practices unlawful, where they also included statements blaming the union for the delay and misstating applicable law). In addition, other statements made during the meetings, including the unlawful solicitation of grievances and promises of benefit if the employees voted against union representation, would militate against the impression that the company’s sole reason for postponing the uniform acquisition or distribution was a desire to avoid the appearance that it had influenced the outcome of the election.

For all of the foregoing reasons, I find that Respondent made statements impermissibly attributing the delay in providing new uniforms to the employees to the Union and its organizing campaign, in violation of Section 8(a)(1).

B. Respondent violated Sections 8(a)(1) and (3) of the Act by discharging Kathleen Falzarano in retaliation for her union activities

#### 1. General principles

Under Section 8(a)(3) of the Act, an employer may not discriminate with regard to the hire, tenure, or any term or condition of employment in order to encourage or discourage membership in a labor organization. In order to determine whether an employee’s discharge violated the Act in this manner, the Board applies the analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To establish an unlawful discharge under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s union sympathies or activities were a substantial or motivating factor in the employer’s decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee’s union support or activity, employer knowledge of that activity, and animus against the employee’s protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Proof of an employer’s motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee’s union support or activities. *Wright Line*, 251 at 1089; *Septix Waste, Inc.*, 346 NLRB

494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12 (1996).

2. Respondent violated Section 8(a)(1) of the Act when Thomas Nicole coercively interrogated Kathleen Falzarano

a. Credibility issues

I generally credit Falzarano as a witness. I found her testimony and demeanor to be straightforward and candid. As discussed below, Falzarano never made any attempt to deny that she falsified her driver logs or landfill tickets. I credit Falzarano's testimony with respect to her orientation and conversations with Larry Simpson and Joe Armahizer. Falzarano's accounts of these events are uncontradicted and were consistent on direct and cross-examination.

I credit Falzarano's testimony regarding her conversation with Nicole immediately after her orientation, wherein Nicole told her that she should not worry about the log books and GPS because he made special arrangements with the Delaware drivers that he did not discuss with Bigler. I also credit Falzarano's testimony regarding their discussion on June 21, when Nicole stated that he intended to "weed out" the "lazy drivers" who only did two loads per day. Nicole testified that he did not have a distinct recollection of either of these conversations, and only denied making the specific statements attributed to him. As a result, Falzarano's testimony regarding these incidents was more detailed and comprehensive, and in fact Nicole stated that he did not recall either conversation. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony). Falzarano's testimony is also more consistent with the documentary evidence concerning the drivers' recording of their hours and work, as discussed below. I therefore credit Falzarano's testimony regarding Nicole's statements during these conversations.

I also credit Falzarano's testimony regarding the conversation on July 5 during which Nicole allegedly interrogated her. Nicole admitted that he had at least one conversation with Falzarano after the election at the Kearney facility. Beyond that, Nicole's testimony regarding his interaction with Falzarano, her union sympathies, and his knowledge of the Union's organizing campaign was contradictory and evasive, and his contention that he never discussed the organizing campaign with the Kepharts was inherently implausible. His account of his conversation with Falzarano during their July 5 meeting changed during the course of the testimony to include more discussion explicitly addressing experiences with unions. Falzarano's testimony regarding their July 5 discussion, by contrast, was straightforward. As a result, I credit Falzarano's account of their July 5 conversation.

I decline to draw an adverse inference from the fact that Respondent did not call Nicole Morrissey to testify, as suggested by General Counsel, but I have taken into account the fact that Respondent did not call her to testify in making credibility resolutions regarding the conversations between Falzarano and Nicole. The evidence establishes that Morrissey was present during several important conversations between Falzarano and Nicole, including the meetings during which Falzarano was allegedly interrogated and was discharged. While an adverse inference may be drawn from the failure of an employer to call a current manager, supervisor, or agent, current employees cannot be considered predisposed to testify in one

manner or another, and are equally available to both parties. *Compare International Automated Machines, Inc.*, 285 NLRB 1122 (1987) and *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910, fn. 6 (1996), *enforced in relevant part*, 123 F.3d 899, 907 (Fed. Cir. 1997).<sup>9</sup> Nicole’s testimony that Morrissey could be considered a driver manager at the Delaware facility, and the testimony of Nicole and Falzarano that Morrissey performs dispatching functions, tend to establish that she is an agent of Respondent. However, because the evidence regarding her role is somewhat sparse, I decline to draw an adverse inference from her failure to testify. I have, however, taken into account Respondent’s failure to call Morrissey to testify regarding some of the critical events in this case when reaching overall credibility resolutions regarding the conversations during which she was present. *Precoat Metals*, 341 NLRB at 1150.

b. Nicole’s interrogation of Falzarano

Based upon the credited testimony of Falzarano, the evidence establishes that Nicole unlawfully interrogated her during their July 5 conversation. The Board determines whether questioning regarding union activities is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer’s hierarchy, the place and method of questioning, and the truthfulness of the employee’s answer. *Manorcare Health Services-Easton*, 356 NLRB No. 39 at 17; *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). The Board also considers whether the employee who was allegedly interrogated was an open and active union supporter. *Evergreen America Corp.*, 348 NLRB at 208 (citing cases).

The evidence here establishes that Nicole’s questioning of Falzarano was coercive. Falzarano was not an open and active supporter of the Union at the time that Nicole questioned her; indeed, there was no organizing campaign in progress at the Delaware facility at the time. Nicole as the terminal manager was the highest ranking manager at the Delaware facility, and had already told Falzarano of his intention to “weed out” the “lazy drivers.” Although Nicole and Falzarano had worked for the same companies in the past, there is no evidence of any friendship or personal relationship here. The conversation took place in the trailer that Nicole and Morrissey use as their office at the Delaware facility, which drivers typically visited solely to drop off their paperwork. Nicole’s question – “How do you feel about the union?” – is the type of inquiry long-held to be coercive in the appropriate circumstances. All of these aspects of the conversation militate in favor of a finding that Nicole’s questioning was coercive. See, e.g., *Demco New York*, 337 NLRB 850, 851 (2002) (questioning of employee who had not previously revealed his union sympathies by the highest-ranking official at employee’s facility coercive).

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<sup>9</sup> While in several cases an Administrative Law Judge has drawn an adverse inference from an employer respondent’s failure to call a manager’s secretary as a witness, I find those cases unpersuasive and inapplicable. In *Pratt Towers, Inc.*, the secretary in question was the sole person that the discriminatee informed regarding the condition for which he was allegedly discharged, and in the case cited by the ALJ in support of drawing an adverse inference Respondent’s owner, as opposed to an employee, was not called to testify. 338 NLRB 61, 98-99 (2002), *citing Bay Metal Cabinets, Inc.*, 302 NLRB 152, 157, 173 (1991) In *Made 4 Film, Inc.*, the ALJ relied in drawing an adverse inference on *Desert Pines Golf Club*, but in that case the Board explicitly declined to rely upon the adverse inference drawn by the ALJ in affirming the ALJ’s decision. 337 NLRB 1152, 1159 (2002), *citing Desert Pines Golf Club*, 334 NLRB 265, fn. 1 (2001). Finally, in *AC Electric*, the secretary not called to testify actually signed the Region’s commerce questionnaire on behalf of Respondent, which contended that it was unaware that the questionnaire existed. 333 NLRB 987, 1000 (2001).

Although Falzarano testified that she responded to the question truthfully, as opposed to dissembling, both her testimony and that of Nicole establishes that he did not let the matter drop at that point. Instead, he related various negative experiences of his own with unions, attributed the demise of Mount Hope Trucking (where he and Falzarano had both worked in the past) to the union, and told Falzarano that he was afraid for his current job, intimating that the Kepharts would close the Delaware facility if the employees brought the Union in. Nicole's following his question with arguments against union representation and raising the spectre of job loss indicates that its effect would not be innocuous. *See Evergreen America Corp.*, 348 NLRB at 208 (questioning accompanied by statements evincing hostility toward unions or union activities more likely to be coercive); *Demco New York Corp.*, 337 NLRB at 851.

In determining that Nicole's question to Falzarano was coercive, I am mindful that the evidence establishes that Falzarano initiated the conversation, and intended to discuss Armahizer's incessant Nextel calls (which involved the union). However, her credited testimony indicates that it was Armahizer's repeated calling, arguments, and insulting remarks that she wished to complain about to Nicole, as opposed to discussing her own union sympathies. In addition, as Falzarano testified, before she even began relating the substance of her complaint to Nicole, he directed her to sit down and asked her what she thought about the Union. I therefore find that although Falzarano initiated the conversation in order to complain about Armahizer's conduct, Nicole was the one who focused the discussion on unions by asking Falzarano about her union sympathies. In other such circumstances, the Board has found an interrogation to be coercive. *See Eagle-Picher Industries*, 331 NLRB 169, 174-175 (2000) (supervisor's questioning regarding union pin during employee-initiated discussion of overtime hours unlawful). As a result, the evidence overall establishes that Nicole's questioning of Falzarano was unlawful.

For all of the foregoing reasons, I find that Respondent violated Section 8(a)(1) when Nicole coercively interrogated Falzarano on July 5.

3. The General Counsel has established a *prima facie* case that Respondent discharged Falzarano in retaliation for her union activities

I find that the General Counsel has established a *prima facie* case that Respondent discharged Falzarano in retaliation for her union activities. The evidence establishes that Falzarano engaged in union activity by speaking positively about her experiences with the Union to both Armahizer and other Kephart Trucking drivers at the landfill. The evidence also establishes that, in response to Nicole's question during their July 5 conversation, Falzarano informed Nicole that she had been in the Union, and spoke in favor of union representation.<sup>10</sup> Nicole was therefore aware that Falzarano had been a member of the Union, and had a favorable view of union representation, prior to her discharge.

The timing of Falzarano's discharge, within days after the July 5 conversation during which Nicole interrogated her and learned of her favorable opinion of unions, also supports the conclusion that Falzarano was unlawfully terminated. *See, e.g., Manorcure Health Services – Easton*, 356 NLRB No. 39 at p. 3, 25 (discipline of employee "just days" after her first public

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<sup>10</sup> I do not credit Nicole's assertion that Falzarano told him that she was in the Union, but never discussed her opinion of union representation. As discussed above, I credit Falzarano's account of this conversation.

support for the union indicative of unlawful motivation); *McClendon Electrical Services*, 340 NLRB 613, fn. 6 (2003), *citing La Gloria Oil*, 337 NLRB 1120 (2002).

The record also establishes that Respondent exhibited animus against the Union. As discussed above, Respondent unlawfully solicited grievances and promised benefits to drivers at its Kearney facility if the employees abandoned their support for the Union, and told the drivers that the new uniforms they desired were delayed as a result of the Union's organizing campaign. These violations are evidence of anti-union animus. See *Austal USA, LLC*, 356 NLRB No. 65 at p. 1-2 (2010) (Section 8(a)(1) violations constitute evidence of animus); *Bally's Atlantic City*, 355 NLRB No. 218 at p. 9 (2010). Although these violations took place at a different facility, they involved both of the Kephart brothers, who are the company's owners and highest level of management. In addition, during his July 5 discussion with Falzarano, Nicole not only unlawfully interrogated her but discussed his history of opposition to union representation, and raised the possibility that bringing a union into the Delaware facility would result in the loss of work. While the latter statements are not alleged as a violation, they may appropriately be considered in making a finding regarding anti-union animus. *Gencorp*, 294 NLRB 717, fn. 1 (1989). For all of the foregoing reasons, I find that General Counsel has shown that Respondent exhibited animus against the Union.

For all of the foregoing reasons, I find that the General Counsel has established a *prima facie* case that Falzarano was discharged in retaliation for her union activities.

4. Respondent has not met its burden to show that it would have discharged Falzarano absent her union activities

Respondent contends that Falzarano was discharged because she falsified the landfill tickets printed out by Waste Management at the Tullytown landfill by changing the times they contained. Falzarano freely admitted that throughout her employment with Respondent the information she provided on her driver logs did not accurately reflect her driving and work time. She testified that she recorded inaccurate times in her driver log in order to be able to perform the amount of work she believed was required by Respondent while simultaneously providing paperwork which would comply with the DOT regulations. Falzarano also admitted that on several occasions she altered the times on the landfill tickets provided to her by Waste Management, so that they comported with the times on the driver logs she had completed. However, the evidence overall does not substantiate Respondent's contention that Falzarano's alteration of the times printed on the landfill tickets was the real reason for her discharge.

In reaching this conclusion, I am mindful that the record establishes that no other driver has falsified landfill tickets, as opposed to driver logs. The record establishes, through both the testimony and a comparison of driver logs and GPS records, that it is not uncommon for driver logs to inaccurately reflect the work hours and locations of the drivers. Nicole in fact admitted that it is not uncommon for drivers to violate the DOT hours of service regulations. Massaline testified that during the period of time that he was hauling three loads per day, his driver logs were inaccurate. Specifically, Massaline stated that Kane instructed him to log all time spent inside the landfill as "off duty," even though the testimony establishes that drivers are on duty and spend time driving inside the landfill. Massaline also testified that when he complained to Barenzeco that he could not haul three loads per day without falsifying his log book, Barenzeco told him that he was "unproductive," and gave his truck to another driver. Cole also testified that Barenzeco pressured him to haul three loads per day, and that Evans once threatened to give



him a verbal warning for failing to do so.<sup>11</sup> Massaline’s testimony regarding Kane’s statements is particularly significant, as Kane was the individual at the Bigler facility specifically responsible for safety and compliance, log analysis, and compliance with DOT regulations.

5       The testimony of these witnesses and the other documentary evidence pertaining to the drivers’ work, such as the driver logs, GPS records, and, indeed, the Notice posted by Nicole reminding drivers that their whereabouts could be ascertained through the GPS system, clearly indicates that Respondent took a “don’t ask, don’t tell” approach to the drivers’ completing their logs in compliance with the DOT hours of service regulations. The evidence establishes that  
10       driver logs were often inaccurate and that drivers did not incur any discipline for falsifying information on their driver logs. The evidence also does not establish that any driver has ever been discharged for failing to keep accurate driver logs.<sup>12</sup> Indeed, Nicole testified that he typically dealt with hours of service violations by telling the particular driver that “they need to keep a better eye on what it is they’re doing,” and informing them that additional violations might  
15       result in other discipline. However, regardless of the evidence that any number of drivers falsified their driver logs with no disciplinary ramifications, Respondent’s contention is that Falzarano was discharged for altering the times which appeared on her landfill ticket. I find that the evidence overall establishes that this proffered reason for her discharge is in fact pretextual, for the following reasons.

20       The evidence establishes that Respondent departed in significant ways from its own policies and procedures when Falzarano was discharged. Respondent’s driver policy manual contains a detailed systems of progressive discipline for violations involving the DOT regulations and driver logs (one of which is entitled “Log falsification, logs do not match weight tickets”).  
25       Termination of employment is not included until after a fourth reprimand for falsification of documentation within the same six month period, whereas the policy manual explicitly states that other violations can result in immediate discharge. Regardless of this language Falzarano was discharged when, according to Respondent, her alteration of the driver logs and landfill tickets was first discovered. Indeed, Nicole did not even consult the driver policy manual prior to  
30       making the decision to discharge her. This departure from both written disciplinary policy and Respondent’s past practices is evidence that Respondent’s asserted reason for discharging Falzarano was pretextual. *See Manorcare Health Services – Easton*, 356 NLRB No. 29 at 3, 26 (“unexplained departure” from normal disciplinary practice evidence of unlawful motivation);

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11 I credit the testimony of current employees Massaline and Cole regarding these conversations. Kane and Evans, both currently employed by Respondent, did not testify. In light of Kane’s explicit responsibility for driver log analysis and compliance with DOT  
40       regulations, I draw an adverse inference from his failure to testify in this respect. I also credit Massaline and Cole’s accounts of their conversations with Barenzeco. While Barenzeco is no longer employed by Respondent, the current employees’ testimony is relatively consistent with respect to Barenzeco’s opinion on the topic of hauling three loads per day. While it is true, as Respondent notes, that Barenzeco was employed at the Kearney facility and not involved in  
45       Falzarano’s employment or discharge, I find that his direction to haul three loads per day is relevant to the prevalence of falsified driver documentation.

12 The sole “Driver Log Falsification Letter” produced by Respondent indicates that the driver in question resigned. Respondent also produced a series of documents entitled “Driver Phone Conference” with attached driver audit sheets and driver log excerpts, but none indicate  
50       when the conference actually occurred in the spaces provided, and none are signed by the manager and compliance officer.

*Regal Health & Rehab Center, Inc.*, 354 NLRB No. 71 at p. 16 (failure to follow progressive disciplinary policy evidence of pretext).

In addition, the evidence establishes, through the testimony of Nicole and the Kepharts, that Respondent makes all personnel decisions through the office at the Bigler facility. Respondent introduced no evidence to explain why, if that was the case, Nicole, the Delaware terminal manager, purportedly discharged Falzarano of his own volition. Respondent's departure from its own asserted hierarchy for making personnel decisions indicates that its proffered reason for discharging Falzarano was pretextual. *Baptist Hospital, Orange*, 328 NLRB 628, 635 (1999) (failure to obtain written authorization of administrator prior to discharge, as required by hospital policy, evidence of pretext).

The evidence also establishes that Respondent conducted no real investigation into Falzarano's falsification of landfill tickets and driver logs, and did not provide her with the opportunity to explain her actions, prior to discharging her. See *Manorcare Health Services – Easton*, 356 NLRB No. 39 at 3, 26 (inadequate investigation consisting of "short conversation" regarding the incident forming the basis for discriminatee's discharge indicates that discharge was in fact unlawfully motivated); *Rood Trucking Co.*, 342 NLRB 895, 900 (2004) (failure to investigate allegations against employee "strong evidence of pretext"). Nicole testified at the hearing that Falzarano's alteration of the landfill tickets warranted discharge because the client could possibly refuse to pay for the loads she had hauled. However, despite admitting that he has no experience with customer relations or billing, he stated that he did absolutely nothing to attempt to confirm or deny this supposition, or to learn the exact amount of money involved, prior to discharging Falzarano. In fact, the evidence establishes that Respondent was paid for all of the loads Falzarano hauled.

Nicole's conversation with Kane on the day Falzarano was discharged cannot be considered to have been a legitimate investigation of any sort. Nicole admitted that he called Kane only after calling Falzarano back to the Delaware facility. Nicole testified that Kane responded immediately, without reviewing GPS or other records, that Falzarano had had some problems with starting times. Nicole did not discuss the falsified landfill tickets with Kane, despite his contention that they formed both his reason for calling Kane (in that they confirmed that Falzarano's driver logs were inaccurate) and the ultimate basis for her discharge. Respondent's failure to conduct any meaningful investigation regarding the ramifications of Falzarano's altered landfill tickets and inaccurate driver logs constitutes evidence of pretext.

The evidence also establishes that Falzarano had altered landfill tickets to comport with driver logs which did not accurately reflect her work several times in the past, but this did not become an issue until after the conversation with Nicole during which she disclosed her union sympathies. Falzarano's landfill tickets show that she altered times by handwriting over the printed numbers on June 22 and 25, and on July 2. The evidence establishes that drivers return all of their paperwork, including driver logs and landfill tickets, to the office trailer at the Delaware facility on a daily basis. The evidence also shows, as discussed above, that the submission of driver logs which did not comport with GPS records and other documents pertaining to the drivers' whereabouts was a relatively regular occurrence. Kane purportedly told Nicole that the start times contained in Falzarano's logs appeared to be inaccurate. However, no one ever discussed Falzarano's driver logs or altered landfill tickets with her until after she spoke in favor of the Union on July 5. It is well-settled that such abrupt imposition of discipline for misconduct an employer has previously condoned or tolerated is evidence of unlawful motivation. See, e.g., *Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003).

Nicole's attempts to explain how Falzarano's alteration of the landfill tickets suddenly caught his attention on July 7 are not credible. Nicole claimed that he was initially confused because Falzarano had indicated that she was picking up a load that morning when he believed that she was to begin the day by delivering a load she had picked up the previous afternoon.

5 However, Falzarano's log for July 6 clearly indicates that she ended her shift that day by dropping a load off in Tullytown, so that she would have returned the truck to the Delaware facility empty. The sign-in sheet from the Parsippany transfer station for July 6 also indicates that Falzarano had picked up a load there which she intended to take to Tullytown that day.<sup>13</sup> Therefore, Nicole's rationale for suddenly reviewing the landfill tickets ultimately boils down to his belief that it was not possible for Falzarano to haul three loads from one of the transfer stations to Tullytown in one twelve hour period – a proposition which could have applied not only to Falzarano's previous driver logs, but to those of a number of other drivers. Ultimately, Nicole advanced no credible reason for focusing on Falzarano at that specific time, and there is no other evidence to establish that any reason existed for targeting her in particular, other than Respondent's knowledge of her union sympathies.

In fact, Nicole provided multiple, shifting reasons for Falzarano's discharge which conflicted with other aspects of his own testimony. Nicole initially focused his explanation on Falzarano's falsification of driver logs. He claimed in his affidavit that he was particularly disturbed by Falzarano's falsification of driver logs given the Notice he had recently posted. The evidence demonstrates that Nicole did not discuss the landfill tickets with Kane, or with Timothy Kephart when he informed Kephart later that day that he had discharged Falzarano.<sup>14</sup> Falzarano testified that when Nicole discharged her he centered on falsification of the driver logs, and only mentioned the alteration of the landfill tickets in passing. Yet at the hearing Nicole contended that the alteration of the landfill tickets, as opposed to the falsification of driver logs, was the reason for Falzarano's discharge. In addition, Nicole testified that Falzarano was discharged in part because she was still undergoing a probationary period. However, he also admitted, confirmed by the driver policy manual, that employees are not subject to a probationary period, and testified that he considered the first month of employment to be a learning period, during which he had reduced expectations for the new employee. It is well-settled that such shifting reasons for an adverse employment action indicate that the Respondent's conduct was in fact unlawfully motivated. See, e.g., *Bebley Enterprises*, 356 NLRB No. 64 at p. 8 (2010).

For all of the foregoing reasons, I find that Respondent discharged Kathleen Falzarano in retaliation for her union activities, in violation of Sections 8(a)(1) and (3) of the Act.

#### Conclusions of Law

1. The Respondent, Kephart Trucking Company, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>13</sup> Nicole's testimony that he reviewed this sign-in sheet before 7 a.m. on July 7 is not plausible given the indication on the sheet itself that it was not faxed to him until 7:07 a.m.

<sup>14</sup> In fact, Timothy Kephart testified that was not aware of the altered landfill tickets when they were sent to the client the following week.

3. By discharging Kathleen Falzarano in retaliation for her union activities, Respondent has engaged in unfair labor practices within the meaning of Sections 8(a)(1) and (3) of the Act.

4. By soliciting employee grievances and promising to remedy them if the employees abandoned their support for the Union, Respondent has violated Section 8(a)(1) of the Act.

5. By informing employees that new uniforms were being delayed because of the Union's organizing campaign, Respondent has violated Section 8(a)(1) of the Act.

6. By coercively interrogating employees regarding their union sympathies, Respondent has violated Section 8(a)(1) of the Act.

7. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

### The Remedy

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having discriminatorily discharged Kathleen Falzarano in retaliation for her protected concerted activities, Respondent must offer Falzarano full reinstatement to her former position or to a substantially equivalent position. Respondent must also make Falzarano whole for any loss of earnings or other benefits she may have suffered as a result of the discrimination against her, plus interest, in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to Falzarano's unlawful discharge, and to notify her in writing that this has been done and that the discharge shall not be used against her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>15</sup>

### ORDER

Respondent Kephart Trucking Company, Inc., Delaware, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in activities on behalf of Teamsters Local 125.

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<sup>15</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Soliciting grievances from employees and promising to remedy them if they abandon their support for Teamsters Local 125.

(c) Informing employees that new uniforms are being delayed because of an organizing campaign conducted by Teamsters Local 125.

(d) Coercively interrogating employees regarding their union sympathies.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days of the date of this Order, offer Kathleen Falzarano full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or to any other rights and privileges previously enjoyed.

(b) Make Kathleen Falzarano whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the unlawful discharge, and within 3 days thereafter, notify Falzarano in writing that this has been done and that the discharge will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Delaware, New Jersey and Kearney, New Jersey, copies of the attached notice marked "Appendix."<sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice

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<sup>16</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

to all current employees and former employees employed by the Respondent at any time since July 9, 2010.

- 5 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated: Washington, DC

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Lauren Esposito  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you because you support Teamsters Local 125.

WE WILL NOT solicit grievances from you and promise to remedy them if you abandon your support for Teamsters Local 125.

WE WILL NOT tell you that new uniforms are being delayed because of Teamsters Local 125.

WE WILL NOT coercively interrogate you regarding your union sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL within 14 days of the date of the Board's Order, offer Kathleen Falzarano full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Kathleen Falzarano whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Kathleen Falzarano, and within 3 days thereafter, notify Falzarano in writing that this has been done and that the discharge will not be used against her in any way.

\_\_\_\_\_  
KEPHART TRUCKING COMPANY, INC.

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

26 Federal Plaza, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND  
MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS  
CONCERNING THIS

NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S  
COMPLIANCE OFFICER, (212) 264-0346.